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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MODY MOALEM et al., Plaintiffs and Respondents, v. JULIA GERARD, Defendant and Appellant.	B268963 (Los Angeles County Super. Ct. No. BC583236)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara Scheper, Judge. Affirmed.

Steven W. O'Reilly for Defendant and Appellant.

Kathryn M. Davis for Plaintiffs and Respondents.

* * * * * *

The trial court ordered that one neighbor remove the tree that had grown, at an angle, over her adjoining neighbor's property. The losing neighbor appeals, arguing that her tree does not constitute a private nuisance. We conclude there was no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

In the early 1990's, defendant Julia Gerard (defendant) owed two adjoining parcels of land on North Harper Avenue in Los Angeles. At that time, she planted a weeping willow tree on the 515 North Harper parcel, near its border with the 519 North Harper parcel. The tree had a "natural lean," and over the next few decades grew at an angle and overhung the adjoining 519 North Harper parcel. Although trees rarely grow straight and can be groomed to do so, defendant took no efforts to prevent the willow tree from growing at an angle. In 2014, plaintiffs Mody Moalem and Orit Moalem (plaintiffs) bought the 519 North Harper parcel. The City of Los Angeles approved their plans to build a two-story house on the parcel, but the weeping willow tree was in the way.

Plaintiffs sued defendant to remove the tree from their property. Specifically, they alleged that the tree constituted a private nuisance because it was "so maintained by [d]efendant that its trunk and main branches [were] permitted to encroach on [their] property." They sought a court order to abate the nuisance.

The trial court conducted a bench trial, and ruled for the plaintiffs. The court found that defendant had "created a condition or permitted a condition to exist that obstructed [plaintiffs'] free use of [their] property" by "allow[ing]" the tree to grow at an angle "for many, many years." The court further concluded that the tree "is clearly interfering with the plaintiffs' use of the property," and that this interference was both "unreasonable" and "substantial[]." Because trimming the tree to eliminate the encroachment would kill the tree, the court ordered defendant to remove the tree within 30 days.

Following entry of judgment, defendant filed this timely appeal.

DISCUSSION

A person may sue civilly to abate a private nuisance. (Civ. Code, §§ 3479 [defining "nuisance"], 3481 [defining "private nuisance"], 3501 [authorizing remedy for abatement suit].) To prevail, he must at a minimum prove (1) the defendant "interfere[ed] with his use and enjoyment of his property," (2) the interference is "substantial," and (3) the interference is "unreasonable." (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 262-263; *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937-938; CACI Nos. 2021 & 2022.)

There appears to be an additional element in most private nuisance claims—namely, that the defendant acted intentionally or negligently in creating the interference or allowing it to persist. Although some cases suggest no such showing is required (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236; *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 42-43; *Calder v. City etc. of San Francisco* (1942) 50 Cal.App.2d 837, 839), the weight of authority indicates that it is, particularly where the factual gravamen of the nuisance claim is an act or omission on the part of the encroacher. (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920; *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 104-106; *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1349; Rest.2d Torts, § 822 & coms. a & b; CACI No. 2021.) But cases on both sides of this split acknowledge that no showing of negligence is required when the interference stems from the overgrowth of trees. (*Lussier*, at p. 102, fn. 5; *City of Pasadena*, at p. 1236-1237; *Mattos*, at pp. 42-43; *Bonde v. Bishop* (1952) 112 Cal.App.2d 1, 5-6.)

Defendant argues that the trial court's ruling was incorrect because there was insufficient proof that she acted negligently. This argument lacks merit for several reasons. To begin, plaintiffs' private nuisance claim is based on the overgrowth of defendant's tree. As noted above, no showing of negligence is required in such cases. Even if we construed plaintiffs' private nuisance claim to rest on defendant's negligent maintenance of the tree, substantial evidence supports the trial court's finding of negligence. (See *Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1217 [reviewing factual findings for substantial evidence].) The evidence showed that trees often grow at an

angle, that people can groom them to grow straight, and that defendant failed to groom the weeping willow tree in such a manner. Such a negligent failure to act can support a negligence-based private nuisance claim. (See *Jones v. Deeter* (1984) 152 Cal.App.3d 798, 805 [failure to trim and/or prune trees can be basis for negligence liability]; accord, *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [nuisance liability may be predicated on omissions].)

In response, defendant argues that (1) the tree was healthy and well-maintained, and (2) she owed no duty to *plaintiffs* to prevent the tree's encroachment because they did not buy the property until 2014 and, at that time, could have seen that the tree was already overgrown. These arguments lack merit. Whether defendant was negligent in tending to the tree's health says nothing about whether she was negligent in allowing it to grow at an angle (and thereby encroach the neighboring parcel). And defendant's second argument that plaintiffs cannot sue because they bought the property *after* the nuisance existed is indistinguishable from the argument that plaintiffs "came to the nuisance." However, "coming to a nuisance" has not been a defense to a nuisance action in nearly a century. (E.g., *Fendley v. Anaheim* (1930) 110 Cal.App. 731, 735-736.)

DISPOSITION

The judgment is affirmed. Plaintiffs are entitled to their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ